Filed 4/12/10 In re E.M. CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re E.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. E.M., Defendant and Appellant.	A125595 (Alameda County Super. Ct. No. SJ09012225-01)

Fourteen-year-old E.M. appeals a juvenile court jurisdictional order finding that she committed a felony assault by force likely to produce great bodily harm and the dispositional order placing her on probation subject to a search condition. She contests the jurisdictional order on the grounds of insufficient evidence and failure to properly consider whether her offense constituted a felony or a misdemeanor. She also argues that the court abused its discretion in imposing a warrantless search requirement as a condition of her probation. We agree that the evidence establishes no more than a simple assault but find no abuse of discretion in imposing the search condition.

FACTUAL AND PROCEDURAL HISTORY

The Alameda County District Attorney filed a juvenile wardship petition alleging that E.M. violated Penal Code section 245, subdivision (a)(1) (assault by means of force likely to produce great bodily harm) and Penal Code section 211 (robbery), bringing her within the court's jurisdiction under Welfare and Institutions Code section 602, subdivision (a).

The following evidence was presented at the jurisdictional hearing. J.E., a student the same age as E.M., testified that on March 25, 2009, after school between 3:00 p.m. and 4:00 p.m., she was walking to her ride with her cousin and a friend. She heard a group of nearby girls, including appellant, remark about her iPhone and iPod, and kept walking. While J.E. was calling her ride, appellant approached her, punched her in the face, and took the phone from her. Appellant and J.E. fell to the ground and fought for about six minutes, during which time appellant's companions kicked J.E. Bystanders eventually broke up the fight. J.E.'s cousin called the police who arrived and took statements from J.E. and other witnesses. J.E. suffered no injuries and did not seek or obtain any medical care after the incident.

Officer Rich Alvarez testified that on March 25, 2009, about 3:39 p.m., he responded to a dispatch at 66th Avenue with his partner, where he took victim's statement and identified appellant as the assailant from a school yearbook. He went to appellant's house, detained her, and took her statement. Appellant recounted a series of events substantially similar to her testimony at trial. She refused to sign the statement prepared by Alvarez, and eventually stopped answering his questions.

Appellant testified on her own behalf that at the time in question she was in the park with four friends. One of her friends told her that J.E. had wanted to fight her. Appellant approached J.E. and asked if this was true.[1] She did not see any mobile phone or iPod on J.E. J.E. told appellant that she did want to fight, and appellant responded by punching her in the shoulder. J.E. punched back, and the two engaged in a brawl. No one else attacked J.E., and no one demanded her phone or other property. Eventually the combatants' companions broke up the fight and the victim left the scene with her friends.

After hearing the testimony and closing arguments, the court announced that it "finds beyond a reasonable doubt that [E.M.] has committed a felony, a violation of section 245(a)(1) and she's described by section 602 of the Welfare and Institutions Code." It made no finding concerning the robbery allegation. Subsequently, the court

[1] Appellant later testified that it was her friends who asked J.E. if she wanted to fight.

placed appellant on probation subject to the condition, to which appellant objected, that she "[s]ubmit person and . . . property under [her] control to search by probation officer or peace officer with or without a search warrant at any time . . . ." Appellant has timely appealed the jurisdictional finding and the dispositional order.

DISCUSSION

Sufficiency of evidence of felony assault

Appellant contends there is insufficient evidence to support the finding that she committed felony assault, and that the finding must be reduced to simple assault. (Pen. Code, §§ 240, 241.) To be a felony, an assault must be committed with a deadly weapon or "by any means of force likely to cause great bodily injury." (Pen. Code, § 245, subd. (a)(1).)[2] "Great bodily injury is physical injury which is significant or substantial, not insignificant, trivial, or moderate." (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748.) "Force likely to cause great bodily injury" refers to the force that an assailant actually asserts against a victim, not what she speculatively could have asserted. (*People v. Duke* (1985) 174 Cal.App.3d 296, 303.)

There is no suggestion that when assaulting J.E., appellant used any type of weapon. While the "use of hands or fists alone may be sufficient to support a conviction of assault by means of force likely to produce great bodily injury" (*In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161), to sustain such a conviction there must be evidence that "the force *actually used* by the appellant . . . was likely to cause great bodily injury to the victim" (*People v. Duke*, *supra*, 174 Cal.App.3d at p. 303). Although as a reviewing court we must adopt any inferences that the trier of fact may reasonably have drawn from the evidence, the record here contains no evidence whatsoever from which an inference can be drawn that appellant struck J.E. with force likely to have caused any harm, much less great bodily injury.[3] Aside from the exculpatory testimony of the appellant herself,

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[2] We do not consider here other statutes that can elevate an assault to a felony, such as an assault committed with the intent to commit mayhem or rape. (Pen. Code, § 220.)

[3] Additionally, the probation report described appellant as "small in stature," casting further doubt on her ability to inflict great bodily injury on the victim.

the only evidence in the record concerning appellant's blow was from the victim. J.E. testified that appellant "punched [her] in the face," that she punched appellant back, and that after a fight lasting approximately six minutes J.E. was physically unharmed. She remained in the area for several minutes after the fight before walking back to a nearby school. There was no testimony describing the force with which appellant struck J.E. or describing the effect of the punch on J.E. There was no testimony that the punch caused J.E. even to flinch or produced redness, much less a bruise, swelling or a laceration. Because the evidence was so sparse, we quote J.E.'s description of the blow in full in the footnote.[4]

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[4] J.E. testified as follows:

"Q. [defense counsel] What's the first thing that happened when she approached you?
A. [J.E.] I just saw her punch me in the face
Q. And did you see her start to punch you in the face?
A. Yes.
Q. What hand did she use?
A. Her right hand.
Q. And when she punched you in the face, what part of the face was struck?
A. Um, this side (indicating), my left side.
Q. Your left side, about your cheek area?
A. Yes. [¶] . . . [¶] . . .
Q. What did you do after you were struck with that punch?
A. I fought back .
Q. How did you fight back?
A. I started punching her, too.
Q. Was there anything in her hands when you punched her?
A. No. [¶] . . . [¶] . . .
Q. Was there a time where you fell to the ground?
A. Yeah.
Q. And she fell with you, correct?
A. Yes.
Q. And while you were on the ground, what kind of contact did you have between you and her?
A. I kept on punching her. [¶] . . . [¶] . . .
Q. While –while you and she were on the ground, did you pull her hair?
A. Yes.
Q. Was there any conversation between you and her while you were fighting?

Without any testimony suggesting in some other manner the force with which appellant struck J.E., the lack of any evidence that J.E. was in fact injured precludes a finding that the punch created a risk of significant injury. Although actual harm is not necessary to establish that an assault was likely to cause a significant injury, if other relevant evidence is insufficient the presence or absence of injury is highly probative. (*People v. Duke, supra*, 174 Cal.App.3d at p. 2020, citing *People v. Roberts* (1981) 114 Cal.App.3d 960, 965; *People v. Muir* (1966) 244 Cal.App.2d 598, 604.) Just as the nature of a victim's injuries can be indicative of the amount of force with which the person was struck (*People v. Muir, supra*, at p. 603), the absence of any injury tends to show an absence of significant force. In overturning defendant's conviction for assault with force likely to cause great bodily injury, the court in *Duke*, cited Witkins's summation that "an assault or battery which does not result in any physical injury, and which does not come

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A. No.
Q. So there was no talking, no calling each other names, no threats, nothing being said?
A. All she said was she was calling me a bitch. [¶] . . . [¶] . . .
Q. If you can estimate, how long was it from the time you were first punched and the time where the fight stopped?
A. Like, around six minutes or so.
Q. Six minutes of fighting. After the fight, did you go to the hospital?
A. No.
Q. Did you get treated by a doctor?
A. No.
Q. Did you have any sutures?
A. No.
Q. Any x-rays get taken?
A. No.
Q. Did you have any medical procedures that you were aware of?
A. No. [¶] . . . [¶] . . .
Q. [Prosecutor:] The defense attorney asked you about the two of you going to the ground and you punching her when you're on the ground. Do you remember that?
A. Yes.
Q. Was she punching you when you were on the ground?
A. Yes.
Q. Why were you punching her when you were on the ground?
A. Because I was defending myself."

within the scope of any of the other felonious assaults, is hardly likely to support anything more than a simple misdemeanor conviction [citation]. And the cases tend to bear out this assumption, for almost invariably they involve blows and physical injuries. . . . [I]f hands fists, or feet, etc. are the means employed, . . . the nature and extent of the injuries inflicted will often be the controlling factor in determining that the force used was [likely to inflict great bodily injury].” (*People v. Duke*, *supra*, 174 Cal.App.3d at pp. 302-303, citing 1 Witkin, Cal. Crimes (1963) § 271, p. 255; see 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes against the Person, § 37(2).)

In the cases cited by the Attorney General upholding convictions for assault likely to cause great bodily injury there was evidence either of the injuries inflicted by the defendant or of the force with which the defendant acted. (See *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1963-1064 [assailant held victim down and put his entire hand down her throat, leaving lacerations at the back of her throat, bruises, bumps, and scratches]; *In re Nirran W., supra,* 207 Cal.App.3d 1157 [defendant’s punch dislocated victim’s jaw and required four to five hours of hospital treatment]; *People v. Wells* (1971) 14 Cal.App.3d 348 [burglar attacked victim with a heavy object and a bladed weapon, leaving her unconscious with cuts, scratches, bruises, and recurring headaches]; *People v. Samuels* (1967) 250 Cal.App.2d 501 [actor in a bondage film attacked hogtied victim with a whip, leaving visible marks on body]; *People v. Muir, supra,* 244 Cal.App.2d 598 [defendant “pitifully wounded” victim and knocked her unconscious]; *People v. Hahn* (1956) 147 Cal.App.2d 308 [defendant hit victim repeatedly with an empty beer can and caused head wounds requiring medical attention].)

Thus, the evidence here does not support the finding that appellant struck J.E. with force likely to have caused great bodily injury and that finding must be set aside. However, as appellant acknowledges, the evidence does support a finding that appellant committed simple assault (Pen. Code, § 241),which is a lesser included offense of assault

with force likely to cause great bodily injury. (*People v. Buice* (1964) 230 Cal.App.2d 324, 345-346.) The juvenile court must be directed to modify its finding to so indicate. [5]

Propriety of warrantless search condition

Appellant also contends that the juvenile court abused its discretion and violated her federal constitutional rights in imposing a warrantless search condition as a term of her probation. She asserts that because her offense involved no use of a weapon, drugs or alcohol, the condition is not narrowly tailored to her circumstances or to the nature of her offense or rationally related to the purposes of juvenile law.

When a minor is adjudged a ward of the court under Welfare and Institutions Code section 602, the court may impose "any and all reasonable orders [or conditions]." (Welf. & Inst. Code, § 730, subd. (b).) " 'A condition of probation which is impermissible for an adult criminal defendant is not necessarily unreasonable for a juvenile . . . .' " (*In re Frank V.* (1991) 233 Cal.App.3d 1232, 1242.) "Although minors possess constitutional rights [citation], '[i]t is well established . . . that the liberty interest of a minor is not coextensive with that of an adult. "[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.' "' ' " (*Id.* at pp. 1242-1243.)

Because the court found no evidence that drugs, alcohol, weapons, or other contraband were involved in appellant's offense, it declined to impose certain conditions suggested by the probation department, such as the requirement that appellant submit to drug tests. However, the requirement that appellant submit to warrantless searches is rationally related to the objective of deterring future criminality. The aggressiveness demonstrated by appellant in the commission of the present offense creates a legitimate concern that she not use weapons or engage in other illegal conduct in the future. The prophylactic search condition is therefore reasonable and permissible in the case of a

[5] In view of this determination, we need not consider appellant's further contention that the court failed to properly consider whether the offense should be classified as a felony or a misdemeanor.

juvenile. (*In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 969; *People v. Bauer* (1989) 211 Cal.App.3d 937, 943.) Its imposition was no abuse of discretion.

Although we have concluded that the designation of appellant's offense as an aggravated assault in violation of Penal Code section 245, subdivision (a)(1) must be set aside, it is not necessary to remand for a new dispositional hearing or for reconsideration of the search condition. The juvenile court was fully cognizant of appellant's behavior when it declared her a ward of the court and placed her on home probation, subject to specified probation conditions. Although her offense must be reduced to a simple assault, there is no reason to believe that the court misunderstood the nature of her conduct or, in light of the reduction of her offense from a felony to a misdemeanor, would consider the search condition any less appropriate.

DISPOSITION

The matter is remanded to the juvenile court with directions to vacate the finding that appellant committed a violation of Penal Code section 245, subdivision (a)(1) and to enter a finding that she committed a violation of Penal Code section 241. In all other respects the jurisdictional findings and dispositional order are affirmed.

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Pollak, Acting P. J.

We concur:

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Siggins, J.

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Jenkins, J.